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No. 86-775

In the Supreme Court of the United States

OCTOBER TERM, 1986

MARSH MEDIA, LTD., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that statutory and regulatory prohibitions against cross-ownership of television broadcast stations and cable television systems are unconstitutional.

1. Petitioner is the owner of a television station in Amarillo, Texas. In 1965, petitioner and three partners obtained a franchise to establish a cable television system in Amarillo. Each partner received a 25% interest in the cable venture, as well as a right of first refusal should any of the other partners elect to sell its interest. Pet. App. 2a, 12a.

At the time that petitioner began its cable venture, neither Congress nor the Federal Communications Commission (FCC) had established rules prohibiting common ownership of television broadcast stations and cable systems in the same market area. After giving the matter extensive

consideration, however,[1] the FCC in 1970 prospectively prohibited the common ownership of television broadcast stations and cable television systems serving the same community. *Second Report and Order in Docket 18397*, 23 F.C.C.2d 816 (1970), reconsideration denied in part, 39 F.C.C. 377 (1973). See also *Second Report and Order in Docket 20423*, 55 F.C.C.2d 540 (1975), reconsideration denied, 58 F.C.C.2d 596 (1976) (codified at 47 C.F.R. 76.501). In 1984, Congress essentially codified the FCC's cross-ownership rule when it enacted Section 613(a) of the Cable Communications Policy Act of 1984 (CCPA), which makes it "unlawful for any person to be a cable operator if such person * * * owns or controls, the licensee of a television broadcast station" that serves "any portion of the community served by such operator's cable system." 47 U.S.C. (Supp. III) 533(a).

2. Petitioner's pre-1970 ownership of its 25% interest in the Amarillo cable system was protected by grandfather provisions in both the FCC's regulation (see 47 C.F.R. 76.501(b)(1)) and in Section 613(f) of the CCPA (47 U.S.C. (Supp. III) 533(f)). In 1977, however, petitioner exercised its right of first refusal to acquire a second 25% interest that was put on the market by one of its partners in the cable venture (Pet. App. 3a). Acting under 47 C.F.R. 76.501, the Commission concluded that this new interest was not grandfathered, and accordingly ordered its divestiture by petitioner. *Marsh Media, Ltd.*, 67 F.C.C.2d 1516, reconsideration denied, 68 F.C.C.2d 712 (1978). Petitioner's appeal

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[1]See *Notice of Inquiry in Docket 15415*, 29 Fed. Reg. 5416 (1964); *First Report in Docket 15415*, 1 F.C.C.2d 387 (1965); *Notice of Inquiry in Docket 17371*, 7 F.C.C.2d 853 (1967); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417 (1968).

of this order was remanded to the Commission when the latter indicated that it was reassessing the cross-ownership restrictions. See Pet. App. 4a; *Further Notice of Proposed Rulemaking in Docket 20423*, 81 F.C.C.2d 150 (1980). At the same time, petitioner filed an independent petition requesting the FCC to repeal 47 C.F.R. 76.501, contending that the Commission had exceeded its statutory authority and had violated the First Amendment when it promulgated the rule.

Both of these proceedings were resolved against petitioner. The Commission first denied the petition seeking the repeal of 47 C.F.R. 76.501 (Pet. App. 21a-25a). The Commission explained that "it is necessary to require divestiture in those situations where there would otherwise be a virtual monopoly over local expression" (*id.* at 24a (footnote omitted)), adding that in such circumstances the cross-ownership prohibition "is essential to ensure the diversity of editorial voices in these local media markets" (*id.* at 24a n.9). The Commission also noted that its prohibitions on cross-ownership of broadcast and cable systems had been codified by Congress in the CCPA, a development that mooted petitioner's request for administrative repeal of the FCC's rule (*id.* at 25a).

The Commission also ultimately denied petitioner's request for reconsideration of the divestiture order in this case (Pet. App. 11a-20a). After generally reaffirming its cross-ownership and divestiture rules (see *Third Report and Order in Docket 20423*, 97 F.C.C.2d 65 (1984)), the Commission concluded that petitioner's exercise of a right of first refusal was not protected by the statutory or regulatory grandfather provisions (Pet. App. 17a-19a). The Commission also explained that it "continue[d] to believe that [its] local ownership rules are essential to ensuring diversity of

editorial voices in local media markets," adding that petitioner "has not demonstrated any specific changes in the Amarillo video marketplace that would justify a grant of its request" (*id.* at 19a (footnote omitted)).

3. The court of appeals rejected petitioner's challenges to both of the FCC orders (Pet. App. 1a-10a). The court first held that the FCC had authority to promulgate the cross-ownership rule (*id.* at 6a-7a) and that it properly had ordered divestiture in this case (*id.* at 7a-9a). The court then rejected petitioner's First Amendment challenge to the cross-ownership restrictions contained in Section 613(a) and 47 C.F.R. 76.501. The court explained that petitioner's constitutional arguments were foreclosed by *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which upheld a Commission rule "restricting cross-ownership of co-located daily newspapers and television stations" (Pet. App. 9a (footnote omitted)). The court added that it was unpersuaded by petitioner's attempt to distinguish the record here from the one in *National Citizens Committee*: the court noted that the cable cross-ownership rule had been considered in several rulemaking proceedings in which an "extensive record [had been] developed." The court accordingly concluded that, "[t]o the extent that the [cable cross-ownership] Rule is based on policy goals and educated 'guestimates' by the Commission, we find no meaningful difference from the 'judgmental or predictive' conclusions undergirding the divestiture order in *National Citizens Committee*." *Ibid.* (quoting 436 U.S. at 813).

4. Before this Court, petitioner makes two principal contentions: that technological developments have obviated the "spectrum scarcity" rationale underlying restrictions on the ownership of television broadcast stations (Pet. 11-16); and that the record before Congress and the Commission

did not support the necessity of the cross-ownership restrictions (Pet. 17-25). These arguments—which invite the Court to assess technological and factual developments that were considered unpersuasive by Congress and the Commission—are without merit and do not warrant further review.

a. This Court has noted that there are a finite number of broadcast channels, a number that generally "is far exceeded by the number of persons wishing to broadcast to the public." *National Citizens Committee,* 436 U.S. at 799. See generally *FCC* v. *League of Women Voters,* 468 U.S. 364, 377 (1984); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 388 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 210-218 (1943). Recognizing that the Commission must adopt rules to govern the allocation of these frequencies among competing applicants, the Court in *National Citizens Committee* upheld against a First Amendment challenge an FCC rule—precisely parallelling the one at issue here—that prohibited common ownership of newspapers and broadcast stations serving the same community. The Court saw "nothing in the First Amendment to prevent the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." 436 U.S. at 799. Since cable television operators hardly have greater First Amendment rights than the publishers of newspapers, the holding in *National Citizens Committee* is dispositive here.

In seeking to escape from this holding, petitioner argues principally that technological developments—increases in the number of available channels, greater use of videocassette recorders, and the like (Pet. 14-15)—have undermined the factual validity of the "spectrum scarcity" rationale that has been held to justify the regulation of broadcasters. We agree, of course, that technological

advances have occurred in this area; the Commission itself has expressed the view that attempts to regulate the *content* of broadcast speech may no longer be justified by the scarcity of electronic media outlets. See *Report in Docket 84-282 (Fairness Report)*, 102 F.C.C.2d 143 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir.).[2] But this hardly supports the broad contention made by petitioner. To the contrary, the Commission's *Fairness Report* addressed only a particular regulation of broadcast content—the "fairness doctrine"—and did not reach rules, such as the one here, that are directed to the ownership structure of the broadcasting industry.

Indeed, in the proceedings below the Commission rejected petitioner's factual submissions as a basis for departing from the ownership rules, declaring its continued belief "that our local ownership rules are essential to ensuring diversity of editorial voices in local media markets" (Pet. App. 19a (footnote omitted)). And as recently as 1984, Congress reached the same conclusion, finding it advisable to codify the FCC's cross-ownership restriction in the CCPA so as "to prevent the development of local media monopolies." H.R. Rep. 98-934, 98th Cong., 2d Sess. 55 (1984). See *id.* at 27. So long as there are more applicants

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[2] *In League of Women Voters*, the Court noted criticism of the spectrum scarcity rationale, but stated that it was "not prepared * * * to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. at 377 n.11. Plainly, neither the Commission nor Congress has provided such a signal as to the cross-ownership restrictions in this case.

than there are broadcast licenses that can be granted,[3] there is no reason to doubt the validity of this conclusion.

b. Petitioner's contention (Pet. 17-25) that the need for statutory and regulatory cross-ownership restrictions was not established by the record before Congress and the Commission also cannot be reconciled with *National Citizens Committee*. In that case, the Court refused to invalidate the Commission's newspaper/broadcast cross-ownership restrictions, even though the "rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints among local communications media"; the Court found it sufficient that, "notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." 436 U.S. at 796.

The Court also explained in *National Citizens Committee* that the factual determinations involved in cross-ownership divestiture rules are "primarily of a judgmental or predictive nature" (436 U.S. at 813). "In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public

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[3]Recent proceedings in which the Commission designated mutually exclusive television applicants for comparative hearings demonstrates that this still is the case. See, *e.g.*, *Charisma Broadcasting Corp.*, 50 Fed. Reg. 32634 (1985) (designating 16 mutually exclusive applicants for a comparative hearing); *Elim Broadcasting, Inc.*, 50 Fed. Reg. 31030 (1985) (21 mutually exclusive applicants); *Vela Broadcasting Co.*, 50 Fed. Reg. 21938 (1985) (13 mutually exclusive applicants); *Kilgore Broadcasting*, 50 Fed. Reg. 7827 (1985) (21 mutually exclusive applicants).

interest lies necessarily involves deductions based on the expert knowledge of the agency' " (*id.* at 814, quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)). The record supporting the cable/broadcast cross-ownership restrictions—which was compiled in four extensive rulemaking proceedings[4] and was endorsed by Congress in the CCPA—is thus more more than adequate.[5]

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[4]See *Notice of Inquiry in Docket 15415*, 29 Fed. Reg. 5416 (1964); *Notice of Inquiry in Docket 17371*, 7 F.C.C.2d 853 (1967); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 F.C.C.2d 417 (1968); *Notice of Proposed Rulemaking in Docket 20423*, 81 F.C.C.2d 150 (1980).

[5]Petitioner's contention (Pet. 17-18) that this conclusion cannot be reconciled with *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), is without merit. In that case, the Court simply declined to reach the merits of a First Amendment challenge to a municipality's regulation of cable television in the absence of adequate information about the nature of cable operations. See *Preferred Communications*, slip op. 5, 6; *id.* at 1 (Blackmun, J., concurring). In contrast, the Commission adopted its rules after extensive rulemaking proceedings in which it received comment from interested parties, giving the Commission and Congress ample information to support the cross-ownership restrictions. Petitioner similarly is off the mark in contending that the cross-ownership restriction at issue here either "singles out a class of persons for different treatment" (Pet. 22) or regulates speech on the basis of content (Pet. 23). In fact, the statute and rule challenged by petitioner treat broadcasters "in essentially the same fashion as other owners of the major media of mass communications." *National Citizens Committee*, 436 U.S. at 801. And the prohibition here is based on the nature of petitioner's other media holdings, not on the content of its speech. See *id.* at 800-801.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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